SUPREME COURT OF THE UNITED STATES

WILBURN DOBBS *v.* WALTER D. ZANT, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92-5579. Decided January 19, 1993

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

A Georgia jury found petitioner Wilburn Dobbs guilty of murder and sentenced him to death. In his first federal habeas petition, petitioner claimed, *inter alia*, that he received ineffective assistance from his court-appointed counsel at sentencing. The District Court rejected this claim after holding an evidentiary hearing. Because a transcript of the closing arguments made at sentencing was, by the State's representation, unavailable, the District Court relied on the testimony of petitioner's counsel regarding the content of his closing argument to find that counsel had rendered effective assistance. Civ. Action No. 80-247 (ND Ga., Jan. 13, 1984), p. 24. The Court of Appeals for the Eleventh Circuit affirmed, also relying on counsel's testimony about his closing argument in mitigation. *Dobbs* v. *Kemp*, 790 F. 2d 1499, 1514, and n. 15 (1986).

Subsequently, petitioner located a transcript of the penalty phase closing arguments, which flatly contradicted the account given by counsel in key respects. Petitioner moved the Court of Appeals, now reviewing related

proceedings from the District Court, to supplement the record on appeal with the sentencing transcript. The court denied this motion without explanation. No. 90–8352 (CA11, Nov. 1, 1990).

Affirming the District Court's denial of relief on other claims, the Eleventh Circuit held that the law of the case doctrine prevented it from revisiting its prior rejection of petitioner's ineffective assistance claim. The court acknowledged the manifest injustice exception to law of the case, but refused to apply the exception, reasoning that its denial of leave to supplement the record left petitioner unable to show an injustice. 963 F. 2d 1403, 1409 (1991).

We hold that the Court of Appeals erred when it refused to consider the full sentencing transcript. We have emphasized before the importance of reviewing capital sentences on a complete record. *Gardner* v. *Florida*, 430 U. S. 349, 361 (1977) (plurality opinion). Cf. *Gregg* v. *Georgia*, 428 U. S. 153, 167, 198 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (Georgia capital sentencing provision requiring transmittal on appeal of complete transcript and record is important "safeguard against arbitrariness and caprice"). In this case, the Court of Appeals offered no justification for its decision to exclude the transcript from consideration. There can be no doubt as to the transcript's relevance, for it calls into serious question the factual predicate on which the District Court and Court of Appeals relied in deciding petitioner's ineffective assistance claim. As the Court of Appeals itself acknowledged, its refusal to review the transcript left it unable to apply the manifest injustice exception to the law of the case doctrine, and hence unable to determine whether its prior decision should be reconsidered.[1]

[1]The concurrence suggests, *post*, at 2–3, that the error in this case, limited in scope to closing arguments at the penalty phase, is likely insignificant. In fact, an inadequate or harmful closing argument, when combined, as here, with a failure to present mitigating evidence, may be highly relevant to the ineffective assistance determination under Eleventh Circuit law. See *King* v. *Strickland*, 714 F. 2d 1481, 1491 (CA11 1983), *vacated on other grounds*, 467 U. S. 1211 (1984), *adhered to on remand*, 748 F. 2d 1462, 1463–1464 (CA11 1984), cert. denied, 471 U. S. 1016 (1985); *Mathis* v. *Zant*, 704 F. Supp. 1062, 1064 (ND Ga. 1989). In any event, we see no reason to depart here from our normal practice of allowing courts more familiar with a case to conduct their own harmless error analyses.

On the facts of this case, exclusion of the transcript cannot be justified by the delay in its discovery. That delay resulted substantially from the State's own erroneous assertions that closing arguments had not been transcribed. As the District Court found: "[T]he entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he legitimately relied on the State's representation is well taken." Civ. Action No. 80–247 (ND Ga., Mar. 6, 1990), p. 4.

We hold that, under the particular circumstances described above, the Court of Appeals erred by refusing to consider the sentencing hearing transcript. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari and give the case plenary consideration.